IN THE MICHIGAN SUPREME COURT

Appeal from the Michigan Court of Appeals
Gleicher, PJ, and Cavanagh and Fort Hood, JJ

IN RE HICKS/BROWN MINORS

Supreme Court No. 153786
Court of Appeals No. 328870
Circuit Court No. 12-506605-NA

APPELLEE-MOTHER'S ANSWER TO THE LAWYER-GUARDIAN AD LITEM'S APPLICATION FOR LEAVE TO APPEAL

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SUMMARY OF ARGUMENT, JUDGMENT APPEALED FROM AND RELIEF SOUGHT

The Lawyer-Guardian Ad Litem ("L-GAL") fails to present jurisprudentially significant reasons for this Court to grant his application. Contrary to his assertions, the Court of Appeals correctly found that the Department of Health and Human Services ("DHHS") had failed to make reasonable efforts to reunify Shawanda Brown, a young disabled mother, with her two children, as required by both MCL 712A.19a and the Americans with Disabilities Act, 42 USC 12101 et seq. The Court of Appeals, applying this Court's rulings in *In re Rood*, 483 Mich 73; 763 NW2d 587 (2009), and *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), also rightly held that DHHS' failure to make such efforts precluded the trial court from terminating Ms. Brown's parental rights. Simply put, the Court of Appeals directly applied existing Michigan jurisprudence to reach the correct result.

But this does not deter the L-GAL. In his attempt to invent a reason for this Court to grant his application, he presents a plethora of unpersuasive arguments in his application. He declares that reasonable efforts need not occur in every case, despite the plain language in MCL 712A.19a(2) and this Court's rulings in *Rood* and *Mason*. Application at 19-22. He claims that Ms. Brown did not actually have a disability despite the uncontroverted evidence that all parties and the trial court knew she suffered from a significant cognitive impairment that impaired her life activities. Application at 25. He argues that even if she suffered from a disability, she received appropriate services from DHHS, a stunning argument in light of a record that reveals a complete failure by the agency to provide services tailored to

Ms. Brown's disabilities. Application at 27. And he suggests that even if DHHS had failed to make reasonable efforts, the trial court could lawfully ignore the agency's transgressions even though everyone had actual knowledge of Ms. Brown's disabilities and despite the assertions by Ms. Brown's attorney that her client was not receiving the appropriate services. Application at 17.

The L-GAL's arguments were considered, and properly rejected by the Court of Appeals. This Court should do the same by denying his application.

COUNTER-STATEMENT OF QUESTION PRESENTED

A. Whether the law requires DHHS to make reasonable efforts to reunify before a trial court can terminate a parent's rights?

L-GAL says no.
Ms. Brown says yes.
Court of Appeals says yes.

B. Whether the trial court erred in terminating Ms. Brown's parental rights where DHHS failed to make reasonable efforts to reunify by failing to provide services accommodating Ms. Brown's known disabilities?

L-GAL says no.
Ms. Brown says yes.
Court of Appeals says yes.

COUNTER-STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Shawanda Brown is a disabled mother of two.

Shawanda Brown is a young mother of two children – Destiny and Elijah – who suffers from a cognitive impairment and depression. Ms. Brown has a Full Scale IQ of only 70, placing her in the second percentile and "within [the] borderline range of intellectual functioning." Juvenile Assessment Center Psychological Report, 5/9/13 at 2. In other words, her critical thinking and reasoning abilities only "exceed those of 2% of her peers." *Id.* Ms. Brown also falls within "the extremely low range of intellectual functioning." *Id.* Additionally, her Working Memory Index score of sixty-nine "places her in the extremely low range" in terms of her ability to retain and recall information. *Id.* at 3. She displays "moderate to severe" cognitive performance problems. Functional Assessment Rating of Mother, 4/10/13 at 1-2. In sum, Ms. Brown's Verbal Comprehension Index (VCI), Perceptual Reasoning Index (PRI), and Working Memory Index (WMI) scores all place her in the "extremely low range" of intellectual functioning. Juvenile Assessment Center Psychological Report, 5/9/13 at 2-3. As a result, Ms. Brown is "limited in her ability to independently manage more complex activities of daily living" and struggles with her judgment and decision-making. *Id.* at 3. Thus, psychologists consider Ms. Brown to have mild mental retardation. *Id.* at 4.

Ms. Brown also struggles with depression. 4/9/13 Tr. at 11-12; Functional Assessment Rating of Mother, 4/10/13 at 1-2; Juvenile Assessment Center Court Report, 4/16/13 at 2; Juvenile Assessment Center Court Report, 7/23/13 at 2; 2/13/14

Tr.; Updated Court Report, 11/7/14. In fact, during her case, Ms. Brown's depression deteriorated to the point that she had suicidal ideations; and, in 2014, doctors admitted her to a mental health facility for observation. Order Following Dispositional Review as to Destiny, 1/15/14 at 1.

DHHS initiates proceedings against Ms. Brown, and the trial court adopts a boilerplate service plan.

In April 2012, DHHS petitioned for jurisdiction of Destiny because Ms. Brown did not have stable housing – an instability linked to a lack of family support. Petition as to Destiny, 4/25/12; Initial Service Plan, 3/16/13 at 2. A DHHS worker also reported that Ms. Brown left Destiny in DHHS care because she felt overwhelmed and unable to care for her. Order After Continued Preliminary Hearing, 4/25/12. On April 10, 2012, at the preliminary hearing, the trial court authorized the petition and removed Destiny. Order to Take Child Into Protective Custody, 4/10/12.

Nine months passed until the court held a jurisdictional trial. Order of Adjudication, 1/28/13.[1] During that lengthy delay, DHHS provided no services to Ms. Brown and arranged no visits between Ms. Brown and Destiny.[2] 11/15/12 Tr.

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[1] The court rules require trial courts to hold the jurisdiction trial within 63 days of removal absent a stipulation for good cause, because process cannot be completed, or because the testimony of an unavailable witness is needed. MCR 3.972. No such exception applied in this case.

[2] The Juvenile Code requires DHHS to create a service plan within 30 days of a child's removal from the home. MCL 712A.13a(10)(a). DHHS failed to create such a service plan until nine months after the child's removal.

at 9; 1/28/13 Tr. at 26-27. On January 28, 2013, the court finally held an adjudication trial and took jurisdiction of Destiny. Order of Adjudication, 1/28/13 at 1. The next day, the court held a dispositional hearing. Order of Disposition, 1/29/13. After reviewing the DHHS plan but without the benefit of a psychological or psychiatric evaluation, the court ordered Ms. Brown to participate in a standard, boilerplate service plan. Accordingly, the court required Ms. Brown to attend and to benefit from parenting classes, to participate in individual counseling, to visit Destiny under supervision, to regularly contact her worker, to complete a GED course and test, to find suitable housing, to obtain a legal source of income, to attend a psychological assessment at a clinic, and to receive prenatal care. *Id.* at 5. The court also ordered DHHS to help Ms. Brown secure housing and to provide Ms. Brown bus tickets so that she could get to her services. *Id.* at 5. The service plan laid out only standard, boilerplate services, designed for the average parent who comes in contact with DHHS, and did not accommodate Ms. Brown's disabilities.

On February 7, 2013, Ms. Brown gave birth to her second child, Elijah. Two days later, DHHS removed Elijah and petitioned the court for jurisdiction, alleging that the conditions that lead to Ms. Brown's first case still persisted. Petition as to Elijah Brown, 2/13/13. The court took jurisdiction of Elijah on February 26, 2013 after Ms. Brown entered a plea that she still lacked stable housing. 4/9/13 Tr. at 5, 9, 17. That same day, the court held a dispositional hearing. Order of Disposition, 4/9/13. The court adopted DHHS' initial service plan as to Elijah, continuing the

same services proposed in Destiny's case, but adding psychiatric services. *Id.* at 18-19; Initial Service Plan as to Elijah, 3/16/13.

DHHS acknowledges "[m]other's apparent limitations," but does not provide accommodations.

Ms. Brown's disabilities were apparent from the beginning of the case and became only more so as time went on. DHHS immediately acknowledged "[m]other's apparent limitations" at the preliminary hearing. Order to take Child into Custody, 4/10/12 at 1. The agency also noted her "abnormal behavior." Amended Petition, 4/18/12 at 3. Over the next few years, the trial court held fifteen additional hearings,[3] during which Ms. Brown's disabilities became only more apparent. One therapist noted that he "immediately observed [Ms. Brown's] cognitive deficits...and minimal insight." Functional Assessment Rating of Mother, 4/10/13 at 1. DHHS workers continued to note Ms. Brown's disabilities throughout the case. For example, a DHHS worker testified that Ms. Brown had "some emotional- -uhm- -issues- - impairments." 2/13/13 Tr. at 7; Petition, 2/13/13 at 2 (citing concerns about Ms. Brown's cognitive abilities). A DHHS worker also observed that Ms. Brown "appears to have some intellectual impairments" such as "a hard time completing simple tasks," "difficulties in making decisions," and "understanding complex terms." Initial Service Plan as to Elijah Brown, 3/16/13 at

[3] Hearings were held on the following dates: 8/29/12; 10/16/12; 11/15/12; 4/23/13; 7/23/13; 10/15/13; 1/15/14; 2/13/14; 5/13/14; 8/13/14; 11/7/14; 11/26/14; 2/20/15; 5/20/15; 6/18/15.

6. A foster care worker[4] also recognized that Ms. Brown had a learning disability, 7/27/15 Tr. at 37, needed help "doing what is necessary," *id.*, and struggled with reading and writing. 8/12/14 Tr. at 10; 11/7/14 Tr. at 12. As a result, one caseworker even recommended Ms. Brown live in an adult foster care home where she could receive assistance with daily care. Petition, 2/12/13 at 3. Additionally, Ms. Brown informed her DHHS workers that she was applying for SSI due to her impairments. *Id.*

Additionally, DHHS workers acknowledged Ms. Brown's mental health issues. See 1/28/13 Tr. at 18-19; Petition as to Elijah Brown, 2/13/13 at 3; Initial Service Plan as to Elijah Brown, 3/16/13 at 4; Order of Adjudication as to Elijah Brown, 4/9/13 at 1; Functional Assessment Rating Mother, 4/10/13 at 1; Juvenile Assessment Center Court Report, 4/16/13 at 2; Updated Court Report, 11/7/14 at 5. Ms. Brown's therapist reported that Ms. Brown suffered from frequent crying spells, feelings of worthlessness, poor self-image, and thoughts of harming herself. Juvenile Assessment Center Court Report, 4/16/13 at 2; Updated Court Report, 11/7/14 at 5. Based on this assessment, doctors prescribed Zoloft to Ms. Brown. Initial Service Plan as to Elijah Brown, 3/16/13 at 4.

DHHS workers consistently acknowledged Ms. Brown's disabilities, and at least one report indicated that Ms. Brown "could benefit [from] intensive services as

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[4] Lutheran Services changed its name several times during Ms. Brown's case, changing from Lutheran Child Services to Wellsprings, to Wellspring Human Services. Additionally, workers referred to the agency by several variations of these names.

evidenced by the client needing more time and support to complete treatment goals." Juvenile Assessment Center Court Report, 10/15/13 at 3. A psychological evaluation further recommended "behavioral therapy that utilizes in-session role playing to address concerns" and opined that "[i]t may be beneficial to administer a measure of adaptive functioning to determine specific strengths and weaknesses with regard to activities of daily living." Juvenile Assessment Center Psychological Report, 5/9/13 at 4. Consistent with the findings in the report, experts suggest disabled parents need specialized services that involve intensive and long-term treatment. See National Council on Disability, *Rocking the Cradle, Chapter 13, Intellectual Disabilities Service Providers* at 264 (2012).[5] Moreover, experts recommend that service providers provide individualized services focused on the parent's particular needs and should provide services in the parent's home, using repetition, demonstration, and other resources that require minimal reading. *Id.* The record, however, does not indicate that Ms. Brown's services met any of these criteria, nor did DHHS ever provide intensive services.

Instead, the only relatively individualized service Ms. Brown received was one-on-one therapy with a therapist who sometimes helped her with things "such as getting a job," housing, and "her emotional stability." 8/13/14 Tr. at 11; 5/20/15 Tr. at 7. Still, Ms. Brown's caseworker was "not sure" if the therapist ever discussed or addressed Ms. Brown's actual abilities and disabilities. 8/13/14 Tr. at 11.

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[5] This source is available at https://www.ncd.gov/publications/2012/Sep272012/Ch13.

Sometimes, Ms. Brown's Lutheran Services worker helped her fill out paperwork. See 11/7/14 Tr. at 12; 1/15/14 Tr. at 11, 16; 7/27/15 Tr. at 22-23. Still, these are standard services that most parents receive from DHHS.

In January 2014, Ms. Brown's attorney inquired about more intensive services for Ms. Brown with a foster care worker from Wellspring Lutheran Services. 1/15/2014 Tr. at 13-14. Specifically, counsel asked about one-on-one parenting help and an incremental health program; the court even speculated about referring Ms. Brown to a specialized "Baby Docket." *Id.* But DHHS never provided these specialized services, and the court did not inquire further. Ms. Brown's attorney again requested specialized services in August 2014, 8/13/14 Tr. at 7, but DHHS never actually provided those services.

Ms. Brown experiences delays in her case.

The law requires DHHS to prepare an Initial Service Plan within thirty days of removal. MCL 712A.13a(10)(a). But DHHS did not do that and only began providing services to Ms. Brown nine months after the children's removal, when the court finally ordered that DHHS provide a treatment plan. 1/29/13 Tr. at 6. By no fault of Ms. Brown, she received no services during this lengthy delay. 1/15/14 Tr. at 18 (court noting that "there were delays and provisions of services that are not chargeable to the mom."). Nonetheless, during this period of delay, Ms. Brown expressed interest in receiving services as quickly as possible; she even requested to voluntarily engage in parenting classes before DHHS created its Initial Service Plan. See 11/15/12 Tr. at 9. But the court denied the request, explaining, "I

actually did order that once, and the Court of Appeals used it to beat me over the head with . . . I got beat over the head once. I don't think I'm going to get beat over the head a second time" *Id.* at 9-10. So DHHS did not provide her with services.

During this lengthy delay, Ms. Brown did not see Destiny for approximately seven months. 1/12/13 Tr. at 27 (testifying that Ms. Brown visited Destiny for the first time on December 12, 2012). But as soon as the case began in April 2012, Ms. Brown tried to set up visits with Destiny. 4/25/12 Tr. at 10, 15. A DHHS worker explained that Ms. Brown's foster care worker from Lutheran Services should have helped facilitate visits and agreed to look into why visits had not been arranged. *Id.* Meanwhile, Ms. Brown persistently showed interest in seeing Destiny, and even called Lutheran Services repeatedly. See 5/7/12 Tr. at 10; 1/28/13 Tr. at 26 (foster care worker testifying to multiple calls). But Ms. Brown's efforts were unsuccessful. And later, without explaining what had happened, a DHHS petition simply stated that Ms. Brown failed to visit Destiny during the first eight months of the case. Petition, 6/4/15. After these long delays in visits, Ms. Brown requested a makeup visit; the court advised, "It's a government agency. They're not going to find you, you've got to kind of get to them, ok?" *Id.* at 10-11.

Ms. Brown experiences discontinuity in her service providers.

Once DHHS finally offered its initial service plan, nine months into the case, Ms. Brown experienced a revolving door of service providers and struggled to find consistency. Both DHHS and a private foster care service provider, Lutheran Services, worked with Ms. Brown. Four different DHHS workers were assigned to

her case. 5/21/12 Tr. (Cordell Huckabee appearing); Petition, 2/12/13 (Vernice Mildrew petitioning); 4/9/13 Tr. (Jacqueline Baskerville appearing); Parent Agency Treatment Plan as to Elijah, 3/16/13 (Joseph Emerenini petitioning). Additionally, at least four different foster care workers from private agencies handled Ms. Brown's case. 5/21/12 Tr. (Vernell Golson appearing from Lutheran Child Services); 11/15/12 Tr. (Beth Houle appearing from Lutheran Child Services); 5/13/14 Tr. (Amanda Delannoy appearing from Wellspring); 8/13/14 Tr. (Yasmin Gibson appearing on behalf of Wellspring Human Services).

Ms. Brown experienced discontinuity with her other service providers as well. For example, one therapist worked with Ms. Brown during most of her case. But that therapist suddenly took a medical leave, and Ms. Brown experienced a month long delay in her weekly therapy appointments. 5/20/15 Tr. at 7. Similarly, Ms. Brown experienced problems with her parenting classes. Although the service provider terminated Ms. Brown because of some confusion, Updated Court Report, 10/15/13 at 4, after a DHHS worker made another referral, Ms. Brown was terminated again "through no fault of her own…[because she was] transferred to a new service provider." 10/15/13 Tr. at 6. Prior to being terminated and transferred, Ms. Brown had already completed six out of seven sessions. Updated Court Report, 10/15/13 at 4.

These frequent changes caused confusion. For example, early in the case, Ms. Brown did not know who her foster care worker was. When Ms. Brown's attorney asked for the worker's name, the DHHS worker answered "The same

worker--I don't recall his name… The same gentleman, I gave you the name and the number when Shawanda needed bus tickets." 10/16/12 Tr. at 8-9. Ms. Brown's attorney clarified that she spoke to a woman previously. *Id.* The DHHS worker speculated, "That's probably from Lutheran . . . but the one in our office, or that's probably whoever else; the other half. From our office it's a male, and I can't pronounce his name. I know who he is and where exactly he sits. So call me and I'll get you that." *Id.* In this way, Ms. Brown struggled to find much needed continuity and consistent communication from her service providers.

Ms. Brown largely complies with services, but struggles to show benefit.

Despite challenges posed by delays and discontinuity, Ms. Brown participated in the court-ordered services. Nonetheless, she struggled to show consistent benefit from the boilerplate services DHHS provided that were not tailored to her needs. Although a foster care worker testified that Ms. Brown cancelled "here and there," 7/27/15 Tr. at 19, the record indicates she regularly visited her children. 1/28/13 Tr. at 34-36. Although she did not take the GED exam, she completed a GED Preparation Course. Updated Court Report, 10/15/13 at 5; Order as to Destiny, 2/13/14 at 1. She attended therapy sessions and seemed "fully engaged." Juvenile Assessment Center Court Report, 10/15/13 at 2; Updated Court Report, 10/15/13 at 4; Juvenile Assessment Center Court Report, 1/15/14, at 2; Updated Court Report, 1/15/14 at 4. She made steady progress in her parent education class, attending regularly. Juvenile Assessment Center Court Report, 1/15/14 at 2. During visits, Ms. Brown improved "in engaging her children during

parenting time." Juvenile Assessment Center Court Report, 10/15/13 at 2. Although Ms. Brown never obtained stable housing or employment, her therapist noted that Ms. Brown was "making progress" and could benefit from more intensive services. Juvenile Assessment Center Court Report, 10/15/13 at 2-3. Due to Ms. Brown's efforts, the court found on several occasions that she indeed had made progress. Permanency Planning Hearing Order, 1/29/13; Order Following PPH as to Elijah, 2/26/13; Order Following Dispositional Review Hearing, 2/13/14; Order Following Dispositional Review Hearing as to Destiny, 8/13/14.

Still, at times, Ms. Brown struggled to show benefit from boilerplate services not geared toward disabled parents. Specifically, her foster care worker reported that Ms. Brown seemed hesitant and needed frequent redirection during visits, once leaving Destiny's dirty diaper unattended, 1/28/13 Tr. at 30, 43, and did not hold Destiny's hand near traffic. 7/27/15 Tr. at 11. At times the court complained, "Mother just doesn't seem to be able to apply what she's learning," and "[s]o, I don't know if it's a mental health issue or it's a lack of motivation or a combination of both. But mother has to take some initiative in this." 2/13/14 Tr. at 10.

As a result, the trial court frequently urged her to make more progress quickly. During a dispositional hearing, the court remarked on Ms. Brown only having a ninth grade education, saying, "Ninth grade. Mom, that's bad. However if you focus on school through a GED program you could probably get a GED in a year . . . Mom, you'd then be somebody." 1/19/13 Tr. at 5. The court further advised, "Harry Potter's not going to come along and tap you with a wand to make these

things happen. You have to make them happen" and warned "if you're not making a lot of progress quickly, you're going to . . . likely get terminated." *Id*. at 7, 8.

Although the foster care worker testified to Ms. Brown's "childlike demeanor," 7/27/15 Tr. at 29-30, the court insisted, "I really don't think workers should be in the business of taking parents by the hand . . . In terms of treating them like children they're not supposed to do that because we're not dealing with children here." 8/13/14 Tr. at 16. The court concluded, "I'm not a bully. I don't like trying to motivate people by scaring them. But . . . I am trying to scare mom. You know, she's across the tracks and there is a freight train coming at her." 1/15/14 Tr. at 19-20.

Ms. Brown's attorney again raises Ms. Brown's disabilities and requests specialized services, but the court moves toward termination.

In August 2014, Ms. Brown's attorney continued to raise concerns that the service plan did not account for her client's needs.[6] 8/13/14 Tr. at 7. For two years, Ms. Brown's attorney asked for foster care workers to work with Ms. Brown "individually" and with "extra servicing" on housing and inquired about an incremental health program. 4/9/13 Tr. at 24; 1/15/14 Tr. at 14. On August 13, 2014, counsel asked about Ms. Brown's disabilities, and a foster care worker testified that Ms. Brown indeed suffered from disabilities. 8/13/14 Tr. at 10. Still,

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[6] Ms. Brown and the court briefly discussed programs such as an Incremental Health Program and "the Baby docket." 1/15/14 Tr. at 14. These services also never came to fruition.

when counsel asked about necessary assessments for these disabilities, the worker seemed flummoxed, testifying, "the last thing that I know was needed was basically an assessment, like some type of psychological assessment, so I thought that we were getting that from the therapist because I don't have any." *Id.* at 7.

Still, the court overlooked this testimony about Ms. Brown's disabilities and DHHS failed to address them. Instead, the court remarked "Frankly, I know what's going to happen at the 17 month point . . . It's either going to be guardianship or it's going to be adoption." *Id.* at 5. Still, at counsel's urging, the court referred Ms. Brown for NSO services,[7] quipping, "whatever that is." *Id.* at 15.

DHHS' pursuit of specialized services never materialized, and the NSO referral fell into limbo. Although a DHHS worker told Ms. Brown's attorney about NSO services much earlier in the case, DHHS did not pursue NSO services until the court referred Ms. Brown in 2014. *Id.* at 13. Several months after the court ordered the NSO referral, DHHS filed the paperwork only to be told that the NSO application process had changed. 2/20/15 Tr. at 10-11. Then, a worker from NSO forwarded the new paperwork, but the foster care worker stated that the agency needed at least four weeks before it would process the paperwork. *Id*. at 11.

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[7] Neighborhood Services Organization (NSO) provides mental health and developmental disability services, such as clinical and outpatient services, permanent supportive housing for homeless individuals like Ms. Brown who suffer from mental illness and disability, and employment services. See Neighborhood Service Organization, *Always Within Reach* <http://www.nso-mi.org/index.php>.

Ultimately, the NSO referral languished and Ms. Brown never received the service. First, the foster care worker explained that NSO administrators never received the paperwork for an appropriate transfer of services. 11/7/14 Tr. at 11. Later, she testified that Ms. Brown was already eligible for disability services, without a transfer to NSO, through her current service provider. 5/20/15 Tr. at 10. The foster care worker testified, "[T]hey are like duplicate services. They provide some of the same things. So she's already a client there. So it would make more sense to just go ahead and start her up with the developmental services through them so we wouldn't have to go through this [transfer] process." *Id.* at 10. The foster care worker pursued a transfer to NSO services anyway for no stated reason. But ultimately, NSO denied Ms. Brown's application because she used a service provider that already could offer disability services. 7/17/15 Tr. at 39. There is no evidence in the record that Ms. Brown ever received any specialized disability services through any of her service providers, despite her foster care worker's statements that such services were available to Ms. Brown. Thus, Ms. Brown never benefited from specialized disability services, either through NSO or her current service provider. Still, the court surmised that "mom has perpetually wanted other people to do the work that she has to do," and "[w]e've tried everything. The only thing that's left is adoption." *Id.* at 16, 18.

While Ms. Brown waited for the NSO services that would never come, her standard service providers reported that she no longer showed progress. Updated Court Report, 11/7/14 (noting limited progress); Juvenile Assessment Center Court

Report, 11/17/14 at 2 (same). The bench advised, "Mom, there are times when it comes down to crunch time where anything other than results . . . or you're probably going to get terminated." 11/26/14 Tr. at 13.

The trial court terminates Ms. Brown's parental rights.

On June 4, 2015, Yasmin Gibson, Ms. Brown's foster care worker, petitioned the court to terminate Ms. Brown's parental rights. Petition, 6/4/15. On July 17, 2015, the trial court held a termination of parental rights hearing. 7/17/15 Tr. Ms. Brown appeared at the hearing via telephone, because she had moved to Cleveland, OH, to live with her extended family. *Id.* At the final hearing, Ms. Brown's attorney continued to remind the court of her client's disabilities. She cross-examined a foster care worker from Wellspring Human Services, who testified "I believe that, um, she is just borderline range of cognitive functioning. So I do believe it has been said in reports that she does need, you know, things to aid her in doing what is necessary." *Id.* at 37. Counsel reminded the court that Ms. Brown had "limitations" and needed specialized help, suggesting that Ms. Brown never received the necessary intensive services and noting that "reasonable efforts have not been made" and that she had raised the issue of disability services "several times at several different hearings." *Id.* at 57-58. DHHS did not present any evidence demonstrating that it had offered specialized services to assist Ms. Brown to safely parent her children.

Counsel's efforts proved futile. The court terminated Ms. Brown's parental rights under MCL 712A.19b(3)(c)(i) and MCL 712A.19b(3)(g). The court concluded,

"Yes, I believe she has some cognitive delays, but she's just totally unmotivated." *Id.* at 64. The court added, "I've used just about my entire toolbox on this mom. Everything that's relevant to try and move her towards becoming somebody." *Id.* at 65. The court did not otherwise mention Ms. Brown's disabilities or how DHHS had provided accommodations for these disabilities.

ARGUMENT

A. THE COURT OF APPEALS CORRECTLY HELD THAT REASONABLE EFFORTS ARE REQUIRED PRIOR TO TERMINATING A PARENT'S RIGHTS.

Standard of Review

Whether the Juvenile Code requires DHHS to make reasonable efforts prior to the termination of a parent's rights is a question of law that this Court reviews de novo. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).

Argument

The L-GAL suggests that a trial court can properly terminate a parent's rights even when DHHS fails to make reasonable efforts to reunify. Application at 19-22. The plain language of the Juvenile Code states otherwise. MCL 712A.19a(2) provides that "reasonable efforts to reunify the child and family must be made in all cases except if any of the following [exceptions] apply." (emphasis added). The circumstances under which DHHS is not required to make reasonable efforts are limited and explicitly delineated in the statute; for instance, they include situations in which a parent has murdered a child.[8] *Id.* None of those situations apply in this case.

Federal law also requires state child welfare agencies to make reasonable efforts to reunify children with their families. 42 USC 671(a)(15)(B) ("reasonable efforts shall be made to preserve and reunify families . . . to make it possible for a

[8] The situations in which DHHS is not required to make reasonable efforts to reunify are listed in both MCL 712A.19a(2) and MCL 722.638.

child to safely return to the child's home"); 45 CFR 1356.21(b) ("The title IV-E agency must make reasonable efforts to maintain the family unit."). To fulfill this responsibility, federal law requires DHHS to create a service plan, providing appropriate services to address parents' particular needs. 42 USC 675(1)(B); *see also* 42 USC 671(a)(16). A state is ineligible for federal funding unless it complies with these requirements. 42 USC 671(a).

This Court has held that the failure to make reasonable efforts to reunify creates a "hole in the evidence" that precludes a trial court from ruling on statutory grounds for termination. *In re Mason*, 486 Mich 142, 160; 782 NW2d 747 (2010); *In re Rood*, 483 Mich 73, 116; 763 NW2d 587 (2009). As this Court noted in *Mason*, terminating a parent's rights without reasonable efforts being made is impermissible, because it "relieve[s] the state of its burden to prove the grounds for termination." *Id.* A parent cannot be faulted for "resulting factual gaps in the record." *Id.* at 117.

Applying these principles, this Court, in *Rood*, reversed a termination of parental rights because DHHS failed to make reasonable efforts to reunify a father with his daughter. *Id.* at 115. Such efforts, which should have included home assessments and services, would have enabled DHHS and the court to determine whether the father was a fit parent. *Id.* at 116. Without reasonable efforts, however, the trial court did not have a full picture of the father's current or future ability to provide a safe home for the child – there were "factual gaps in the record." *Id.* at 117. The court was "left to merely assume" that placement would harm the

child. *Id.* Similarly, in *Mason*, this Court found that because of DHHS' failures to provide appropriate services to an incarcerated father, the request to terminate his parental rights was "premature." *Mason*, 486 Mich at 169. DHHS, in its own policy manual, captures the essence of these rulings: "It is only when timely and intensive services are provided to families that agencies and courts can make informed decisions about a parent's ability to protect and care for his/her children. Michigan Dep't of Health and Human Services, *Children's Foster Care Manual* 722-05, at 10-11.

Both MCL 712A.19a(2) and this Court's jurisprudence establish a clear legal principle that the Court of Appeals properly applied: DHHS has an affirmative obligation to make reasonable efforts to reunify. When the agency fails to make these efforts, the court is deprived of the information necessary to determine whether a parent can safely parent her child and thus cannot develop the full picture it needs to evaluate whether the statutory grounds for termination have been met by clear and convincing evidence. Instead, the court faces "factual gaps in the record" that preclude the termination of that parent's rights. *Rood* 483 Mich at 117.

B. BECAUSE DHHS' EFFORTS TO REUNIFY MS. BROWN WITH HER CHILDREN WERE UNREASONABLE, THE COURT OF APPEALS PROPERLY REVERSED THE TERMINATION OF PARENTAL RIGHTS DECISION.

Standard of Review

Whether DHHS' reunification efforts were reasonable directly relates to whether the trial court had sufficient evidence to terminate a parent's rights, a

finding reviewed for clear error. MCR 3.977(J); *In re Sour*s, 459 Mich 624, 633; 593 NW2d 520 (1999); *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). A court's decision to terminate parental rights is clearly erroneous, when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209; 661 NW 2d 216 (2003).

Argument

1. To Satisfy The Reasonable Efforts Requirement, DHHS Must Provide Tailored Services That Reasonably Accommodate A Parent's Disability.

As noted above, both federal and state law require DHHS to make reasonable efforts to reunify children with their parents. MCL 712A.19a(2); 42 USC 671(a)(15)(B). To make reasonable efforts, DHHS must prepare a case service plan detailing "[e]fforts to be made by the agency to return the child to his or her home" and a "[s]chedule of services to be provided to the parent, child, and if the child is to be placed in foster care, the foster parent, to facilitate the child's return to his or her home." MCL 712A.18f(3)(d). It is the DHHS' responsibility to "ensure that appropriate services are provided." *Rood*, 483 Mich at 605. Services must be "tailored to meet each client's needs and to recognize the unique aspects of the case." Michigan Dep't of Health and Human Services, *Services Requirements Manual*, 101 at 2 (2015).[9]

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[9] Michigan Dep't of Health and Human Services, *Services Requirements Manual*, <http://www.mfia.state.mi.us/OLMWEB/EX/SR/Public/SRM/101.pdf>

Judge Leonard Edwards identifies five questions the trial court should ask to ascertain whether reasonable efforts have been made:

> (1) What was the danger that brought the child to the attention of the court?
> (2) What family problems are causing the danger?
> (3) Has the agency identified the services that will best alleviate or reduce the danger to the child and permit the child safely to return home?
> (4) Have caseworkers diligently arranged for those services?
> (5) Are these services available to the family in a timely basis?

Edwards, *Reasonable Efforts: A Judicial Perspective* (United States: Edwards, 2014), p 101. These services may include parenting classes, mental health services, day care, drug and alcohol abuse counseling, or emergency financial assistance. DHHS *Children's Foster Care Manual*, 722-06, at 10 (2015).[10]

Where a parent has known disabilities, the statutory obligation to make reasonable efforts requires DHHS to offer services that reasonably accommodate the parent's disabilities, as required by the Americans with Disabilities Act.[11] *In re*

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[10] Michigan Dep't of Health and Human Services, *Children's Foster Care Manual*, <http://www.mfia.state.mi.us/OLMWEB/EX/FO/Public/FOM/722-06.pdf>

[11] The LGAL cites to numerous out-of-state decisions to suggest that the ADA does not require child welfare agencies to make reasonable accommodations when implementing service plans. See Application at 30-32. But the cases cited in his brief are inapposite. In fact, most actually hold that a child welfare agency must take into account a parent's disability when effectuating a service plan. See *State ex rel KC v State*, 362 P3d 1248, 1252; 2015 UT 92; (Utah 2015) ("To the extent the government is providing services aimed at reunification, we have no doubt that the ADA applies."); *People ex rel CZ,* 360 P3d 228, 234; 2015 COA 87 (Ct App Co 2015) (noting that the ADA "applies to the provision of assessments, treatments, and others services that a department provides to parents through a dependency and neglect proceeding prior to a termination hearing."); *In re Custody & Guardianship*

Terry, 240 Mich App 14, 26; 610 NW2d 563 (2000); 42 USC 12132 (prohibiting agencies from denying benefits of services to disabled individuals); 28 CFR 35.130(b) (prohibiting agencies from affording a disabled individual "an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others."). In *Terry*, the Court of Appeals held that if DHHS "fails to take into account the parents' limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family." *Id.*

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of La'Asia S, 191 Misc 28, 43; 739 NYS2d 898 (Fam Ct NY 2002) ("The court . . . will look to the ADA for guidance in evaluating the agency's efforts in this case."); *In the Interest of Doe*, 60 P3d 285, 293 ; 100 Haw 335 (Haw 2002) (noting DHS must make "every reasonable opportunity" for a parent to be reunited with his or her child."); *NJ Div of Youth and Family Services v AG*, 782 A2d 458, 473; 344 NJ Super 418 (NJ Super 2001) ("The Division's efforts in providing classes and parenting programs must by their very nature take into consideration the abilities and mental conditions of the parents."); *Adoption of Gregory*, 747 NE2d 120, 122; 434 Mass 117 (Mass 2001) (noting that the ADA requires "the department to accommodate the parents' special needs in its provisions of services" prior to a termination proceeding); *In re Welfare of AJR*; 896 P2d 1298, 1302; 78 Wn App 222 (Ct App Wa 1995) (noting that the ADA requires the state "to make reasonable accommodations to allow the disabled person to receive the services" but finding that the agency had offered "specific services tailored to [the parents'] developmental disabilities."). The only other decisions to which he cites interpreted statutory schemes very different from Michigan's that allow agencies to seek termination of parental rights even without making reasonable efforts to reunify. See *In re Chance Jahmel B.*, 187 Misc 2d 626, 633; 723 NYS 2d 634 (Fam Ct NY 2001) ("New York State law does not require the provision of services to parents as a prerequisite to termination of parental rights based upon mental illness."); *In re BS*, 693 A2d 716, 721; 166 Vt 345 (Vt 1997) ("The Legislature has not called for an open-ended inquiry into how the parents might respond to alternative SRS services and why those services have not been provided.").

Reasonable accommodations, according to the U.S. Department of Justice and Department of Health and Human Services, may include "enhanced or supplemental training, increased frequency of training opportunities, [and] training in familiar environments conducive to learning." US Department of Health and Human Services and US Department of Justice, *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.*[12] Services to disabled parents should incorporate "learning techniques of persons with disabilities and may need to incorporate the use of visual modeling or other individualized techniques." *Id.* In short, DHHS cannot simply provide the same services to disabled and non-disabled parents to ascertain whether they can safely care for their children. *Id.* Experts recognize that disabled parents need specialized services that involve intensive, long-term, and individualized treatments. See National Council on Disability, *Rocking the Cradle, Chapter 13, Intellectual Disabilities Service Providers* at 264 (2012).

States across the country have implemented this approach. For instance, a New York appellate court found that the child welfare agency had failed to make reasonable efforts where it did not provide psychological services or specialized services for a mentally disabled parent. *In the Matter of L Children*, 131 Misc 2d 81, 88; 499 NYS2d 587 (NY Fam Ct 1986). Similarly, a California appellate court

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[12] <http://www.ada.gov/doj_hhs_ta/child_welfare_ta.html>

found that the agency failed to make reasonable efforts for a parent whose mental disability "should have been apparent to those assessing the suitability of services offered to her" but was not considered in developing her service plan. *In re Victoria M*, 207 Cal App 3d 1317, 1329; 255 Cal Rptr 498 (1989). There, the mother had an IQ of 72, in the borderline range of intelligence. *Id.* at 1322. In light of her limitations, the cookie-cutter services provided were insufficient. *Id.* at 1330. The court noted that "failure is inevitable" if "generic services are offered to a parent suffering from a mental incapacity." *Id.* at 1332. Similarly, the Rhode Island Supreme Court determined that "[e]fforts to encourage and strengthen the parental relationship which are reasonable with respect to an average parent are not necessarily reasonable with respect to an intellectually limited person." *In re William, Susan, and Joseph*, 448 A2d 1250, 1255 (RI 1982).

2. Ms. Brown is a qualified individual with a disability under the Americans with Disabilities Act.

Here, contrary to the L-GAL's assertions, DHHS failed to make reasonable efforts because it did not design a service plan that accommodated Ms. Brown's obvious disability.

Under the ADA, a "disability" is defined to include "a physical or mental impairment that substantially limits one or more major life activities." 42 USC § 12102(1). Among the enumerated "major life activities" are "caring for oneself . . . learning, reading, concentrating, thinking, communicating, and working," though the list is non-exhaustive. 42 USC § 12102(2). Mental impairments such as mental

retardation and specific learning disabilities qualify as disabilities. 28 CFR § 35.104(1).

Overwhelming evidence showed that Ms. Brown was disabled due to a cognitive impairment. A comprehensive psychological report revealed that Ms. Brown had an IQ of 70, at the second percentile and within the borderline range of intellectual functioning. Juvenile Assessment Center Psychological Report Mother, 5/9/13 at 2. Her Verbal Comprehension Index (VCI), Perceptual Reasoning Index (PRI), and Working Memory Index (WMI) scores all placed her in the "extremely low range" of intellectual functioning. *Id.* at 2-3. These scores reflect Ms. Brown's limited ability to think abstractly, comprehend new information, process complex visual information, or retain and reproduce information. *Id.* The psychologist who conducted the evaluation found that Ms. Brown's low cognitive functioning may mean that she would be "limited in her ability to independently manage more complex activities of daily living" and would interfere with her judgment and decision making. *Id.* at 3. The psychologist diagnosed her with mild depression, mild mental retardation, and borderline intellectual functioning. *Id.* at 4. Her functional assessment rating also revealed a "moderate to severe" cognitive performance deficit. Functional Assessment Rating, 4/10/13 at 2. A second evaluation again recognized her apparent cognitive limitations and recommended that Ms. Brown be provided with additional support during her court involvement. Clinic for Child Study Evaluation, 4/19/13 at 6.

Not only was Ms. Brown's disability obvious, DHHS workers openly acknowledged that she was disabled. As early as the initial removal of Destiny in 2012, DHHS workers noted Ms. Brown's "apparent limitations," Order to take Child Into Protective Custody, 4/10/12 at 1, and "abnormal behavior." Amended Petition, 4/18/12 at 3. Her initial service plan recognized that Ms. Brown "appears to have some intellectual impairments." Initial Service Plan, 3/16/13 at 6. The plan further indicated that Ms. Brown has "difficulties in making decisions," "a hard time understanding simple tasks," and cannot write in complete sentences. *Id.* Cordell Huckaby, the DHHS worker who spoke with Ms. Brown on the day of Destiny's removal, admitted that Ms. Brown told him that she had mental health issues. 1/28/13 Tr. at 18. At the preliminary hearing to remove Elijah, DHHS worker Jacqueline Baskerville acknowledged that Ms. Brown "does have some emotional--uh--and cognitive--uhm--issues--impairments." 2/13/13 Tr. at 7. Similarly, caseworker Vernice Mildrew expressed concerns about Ms. Brown's cognitive ability to care for her children. Petition, 2/12/13 at 2. In fact, Ms. Mildrew recommended that Ms. Brown reside in an adult foster care home for assistance with daily care. *Id.* at 3. Ms. Brown had informed DHHS that she suffered from depression and was applying for SSI due to mental impairment. *Id.* Her foster care worker, Yasmin Gibson, admitted that she was aware of Ms. Brown's disabilities and recognized Ms. Brown's difficulties with reading and writing. 8/12/14 Tr. at 10; 11/7/14 Tr. at 12. Ms. Gibson also acknowledged Ms. Brown's learning disability, stating that she believed Ms. Brown's "just borderline range of cognitive functioning" required

"things to aid her in doing what is necessary." 7/27/15 Tr. at 37. The trial court itself indicated that it believed Ms. Brown had cognitive delays. *Id.* at 64. In short, there was no doubt among all the players in the case that Ms. Brown was a disabled parent.

3. DHHS' failure to accommodate Ms. Brown's known disability in developing and implementing her service plan precludes a finding of reasonable efforts.

Despite the obvious evidence of Ms. Brown's disability, DHHS failed to reasonably accommodate her disability when designing its service plan, and instead provided her with a standard, cookie-cutter service plan.

A parent's service plan must account for the parent's limitations and disabilities. See *Terry*, 240 Mich App at 26; DHHS *Children's Foster Care Manual*, 722-06F. Notably, specialized services are available and have been provided to other disabled parents in Michigan. For example, in one case, a parent was provided with specialized parenting classes that accommodated his reading disability. *In re Pomaville*, unpublished opinion per curiam of the Court of Appeals, issued January 13, 2004 (Docket No. 247168), at 1, Attachment A.[13] In another case, the DHHS caseworker testified that all providers specifically tailored their services to the mother's cognitive impairment, using "tailored methods such as repetition and role modeling." *In re Rice*, unpublished opinion per curiam of the Court of Appeals, issued November 12, 2013 (Docket No. 315766), at 1, Attachment

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[13] The unpublished decisions are being cited because they describe ways in which DHHS has accommodated a parent's disability in other cases.

B. Even in this case, the parties identified specialized services that could have been provided to address Ms. Brown's disability. 5/20/15 Tr. at 10.

Yet DHHS still failed to provide any specialized services to accommodate Ms. Brown's disability. Instead, the agency provided Ms. Brown with the same services it would have provided to a non-disabled parent. Ms. Brown was referred to parenting classes, but her caseworker admitted that Ms. Brown had never been referred to one-on-one or specialized parenting classes to accommodate her disability. 7/27/15 Tr. at 44. While Ms. Brown was enrolled in individual therapy, her caseworker admitted that the therapist focused on concerns "such as getting a job" and "her emotional stability." 8/13/14 Tr. at 11. Although the therapist helped Ms. Brown with housing and employment, Ms. Brown's caseworker was "not sure" that her therapist had ever discussed or addressed Ms. Brown's actual abilities and disabilities. 5/20/15 Tr. at 7; 8/13/14 Tr. at 11. And though Ms. Brown's attorney repeatedly asked for specialized disability services through the Neighborhood Service Organization (NSO), her caseworker never procured the services or even completed a referral. 8/13/15 Tr. at 10; 11/7/14 Tr. at 11; 11/16/14 Tr. at 6; 2/20/15 Tr. at 10-11; 5/20/15 Tr. at 10; 7/27/15 Tr. at 39-40. In fact, developmental disability services were available through Ms. Brown's existing provider, yet Ms. Brown's caseworker did not even attempt to explore the existing services until May 2015, one month before the termination hearing. 5/20/15 Tr. at 10. Moreover, Ms. Brown's attorney requested one-on-one parenting help and a targeted program for

disabled individuals, yet the DHHS worker failed to refer Ms. Brown for the services. 1/15/14 Tr. at 13-14.

Without appropriate services, Ms. Brown struggled to show benefit despite making significant efforts to comply with the trial court's high expectations. The court, for instance, insisted that Ms. Brown could "focus on school through a GED program" and "get a GED in a year." 1/29/13 Tr. at 5. To comply, Ms. Brown attended weekly tutoring for her GED; she failed, however, to complete testing. Updated Court Report, 10/15/13 at 5; Order as to Destiny, 2/13/14 at 1. Similarly, Ms. Brown attended weekly therapy sessions. Her therapist reported that Ms. Brown was "fully engaged" in therapy sessions and successfully completing behavioral assignments. Updated Court Report, 10/15/13 at 4. Her therapist also noted that Ms. Brown was "making progress" and could benefit from more intensive services, which were never provided. Juvenile Assessment Center Court Report, 10/15/13 at 2-3. One year later, with the same standard services, Ms. Brown "continue[d] to struggle" with goals in her service plan, like obtaining housing and employment. Juvenile Assessment Center Court Report, 11/17/14 at 5. Similarly, Ms. Brown, while showing improvement in some areas, struggled at times to demonstrate her ability to parent during parenting time. Updated Court Report, 10/15/13 at 4-5. While her provider for parenting classes asserted that Ms. Brown was making some progress, she believed that Ms. Brown would need more time to complete the goal of service. Juvenile Assessment Center Court Report, 1/15/14 at 2. Instead, DHHS terminated Ms. Brown's parenting classes when she completed

the standard program; unsurprisingly, the trial court noted that Ms. Brown "in more than a few ways has not benefitted." Order, 1/15/14 at 1.

Despite Ms. Brown's struggle to benefit from cookie-cutter services, the trial court admonished Ms. Brown's attorney when she requested specific accommodations, telling her that DHHS is not "in the business of taking parents by the hand" and "we're not dealing with children here." 8/13/14 Tr. at 16.

DHHS failed to account for and accommodate Ms. Brown's known disability in developing her service plan and did not offer her individualized services tailored to meet her specific needs, as required by the ADA. Consequently, the trial court erred in finding that DHHS made reasonable efforts and erred in terminating her parental rights.

4. DHHS And The Trial Court Knew About Ms. Brown's Disabilities And Could Not Ignore Her Special Needs.

Finally, the L-GAL argues that the Court of Appeals should have affirmed the termination of Ms. Brown's parental rights even if DHHS had failed to reasonably accommodate Ms. Brown's known disabilities in its service plan. He claims that Ms. Brown's attorney didn't do enough to preserve the issue.[14]

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[14] The L-GAL suggests that Ms. Brown's attorney had an obligation to appeal the trial court's interlocutory findings that DHHS had made reasonable efforts to reunify. Application at 22 ("Appellant never appealed these determinations."). But in *People v Torres*, 452 Mich 43; 549 NW2d 540 (1996), this Court held that a party "may raise previous interlocutory decisions when it brings an appeal of right from a final order." *Id.* at 60. Additionally, here, the reasonable efforts findings directly relate to whether the trial court had clear and convincing evidence to terminate Ms. Brown's parental rights, the ultimate question at issue in this appeal.

His argument fails for three reasons. First, throughout the case and at the final TPR hearing, Ms. Brown's attorney repeatedly argued that DHHS was failing to provide her client with services tailored to her special needs. See 4/9/13 Tr. at 25 (asking DHHS to work with her client "individually" to address her housing needs); 1/15/14 Tr. at 13-14 (inquiring about one-on-one parenting help); 8/30/14 Tr. at 7 (expressing concern that DHHS was not providing appropriate services and requesting additional services); 1/27/15 Tr. at 57 (arguing that "reasonable efforts have not been made to work with the mother in this case" and noting that she has raised the issue of disability services "several times at several different hearings."). The trial court considered and rejected her arguments. By raising the issue and giving the trial court the opportunity to consider her arguments, she preserved the issue.

Second, the L-GAL misunderstands the nature of the reasonable efforts requirement, which is an affirmative obligation DHHS must meet in order to terminate a parent's rights. MCL 712A.19a(2). This Court's holdings in *Mason* and *Rood* establish that a trial court cannot terminate a parent's rights unless DHHS has made the appropriate efforts to reunify a family. *Mason*, 486 Mich at 160; *Rood*, 483 Mich at 116. If the agency fails to do so, a court is precluded from finding by clear and convincing evidence that a parent cannot safely care for a child. In other words, to satisfy its legal burden, DHHS must first demonstrate to the trial court that it has made reasonable efforts to reunify the family.

Finally, regardless of whether a parent's attorney raises the issue, the ADA does not allow DHHS to ignore known and obvious disabilities when providing services to a family. The ADA was designed to combat discrimination against the disabled, "most often the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect." *Alexander v Choate*, 469 US 287, 295; 105 S Ct 712; 83 L Ed 2d 661 (1985).[15] In implementing the ADA, Congress echoed these sentiments. It codified the ADA's findings and purpose to address the "serious and pervasive social problem" of discrimination against the disabled that "persists in critical areas." 42 USC § 12101(a)(2)-(3). The Congressional Committee on Education and Labor noted that "[b]y almost any definition, Americans with disabilities are uniquely underprivileged and disadvantaged. They are much poorer, much less well educated and have much less social life, have fewer amenities and have a lower level of self-satisfaction than other Americans." H.R. REP. 101-485, 29, 1990 U.S.C.C.A.N. 303, 310 (quoting testimony before the Senate Subcommittee on the Handicapped by Humphrey Taylor, Louis Harris and Associates, S. Hrng. 100–166, part 2, April 28, 1987, at 9). Disabled individuals face discrimination that "results from actions or inactions that discriminate by effect as well as by intent or design," from "standards, criteria, practices or procedures that are based on thoughtlessness or indifference." *Id.* Thus, the ADA was implemented "to provide a clear and comprehensive national

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[15] This case was decided under the Rehabilitation Act, the protections of which are expressly extended by the ADA. 28 CFR § 35.103.

mandate for the elimination of discrimination against individuals with disabilities." 42 USC § 12101(b)(1).

The United States Supreme Court recognized that the concerns expressed by Congress would "ring hollow" if the legislation could not reach conduct and policies that "discriminated by effect as well as by design." *Alexander*, 469 US at 297. Thus, disabled individuals must be provided with "meaningful access to the benefit" provided by public services. *Id.* at 301. Though not guaranteeing equal results, the ADA provides that public services, to be equally effective, "must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement." *Id.* at 305. As a result, public agencies are required to make reasonable accommodations to their programs or benefits to avoid discriminating against individuals with disabilities. 28 CFR § 35.130.

A public entity is liable under the ADA when it knows that an individual is disabled, "either because that disability is obvious or because the individual (or someone else) has informed the entity of the disability," and knows that an accommodation is necessary to address the disabled individual's limited ability to engage in services.[16] *Robertson v Las Animas Co Sheriff's Dep't*, 500 F3d 1185, 1196-1197 (CA 10, 2007).

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[16] Not only does the ADA require public agencies to accommodate a known disability, but it also imposes compensatory damages when an agency is "deliberately indifferent" to an obvious need. *SH ex rel Durrell v Lower Merion Sch Dist*, 729 F3d 248, 262 (CA 3, 2013); *Duvall v County of Kitsap*, 360 F3d 1124 (CA 9, 2001).

While knowledge may derive from a specific request for an accommodation, it may also "follow from the entity's knowledge of the individual's disability and his need for, or attempt to participate in or receive the benefits of, a certain service." *Id.* at 1997. It is "flawed" to reason that an agency has no obligation to provide accommodations without a specific request. *Chisolm v McManimon*, 275 F3d 315, 330 (CA 3, 2001); *Kiman v New Hampshire Dep't of Corrections*, 451 F3d 274, 283 (CA 1, 2006) (noting that "sometimes the [person]'s need for an accommodation will be obvious; and in such cases, different rules may apply."). This is particularly true because disabled individuals may be unaware that accommodations are even available. *Chisolm*, 375 F3d at 330. And an agency cannot be excused for a failure to discuss issues related to a client's known disability. *Id.*; see also *Randolph v Rodgers*, 170 F3d 850, 858-859 (CA 8, 1999) ("While it is true that public entities are not required to guess at what accommodations they should provide, the requirement does not narrow the ADA . . . so much that the [public entity] may claim [the disabled person] failed to request an accommodation when it declined to discuss the issue with him.").

In *Robertson*, for instance, the Tenth Circuit reversed a trial court's summary judgment ruling for the agency when the agency had failed to provide accommodations for a deaf inmate. 500 F3d at 1196. There, the officers at the prison were on notice that the client was disabled. The officers inventoried hearing aid batteries when they booked the plaintiff, the inmate communicated through written notes rather than the phone in his cell, and the officers "acted as if they

knew [he] was deaf." *Id.* at 1197, 1198. In light of this knowledge, the fact that the client failed to raise the ADA was not dispositive. *Id.* at 1197.

Like any other public agency, DHHS must accommodate known disabilities. But it also has a greater obligation than other agencies: it has an affirmative statutory duty to make reasonable efforts and provide appropriate services to reunify children with their parents. MCL 712A.19a(2). It fails to meet this affirmative duty if it does not make reasonable accommodations for a parent's known disabilities. DHHS cannot be exempt from the basic requirements that other public agencies face, particularly in light of this duty. It must accommodate known and obvious disabilities, like every other state agency, whether or not the parent raises a specific objection. Consistent with this, the DHHS manual mandates that efforts be "tailored to meet each client's needs and to recognize the unique aspects of the case." DHHS *Services Requirements Manual*, 101 at 2. A service plan cannot be "tailored" to a client's "unique" needs if it ignores one of the most important obstacles that a parent faces: her disability. That is not "reasonable efforts;" it is no effort at all.

Additionally, DHHS is in the best position to know what services it has available and which services would be appropriate based on the evaluations it performs in its regular course of business. It also has a designated ADA Coordinator.[17] The burden of complying with the ADA is thus minimal – and it is

[17] See Michigan Dep't of Technology, Management, and Budget, *State of Michigan Title I and II Accessibility Coordinators*

one that every public agency must bear. Accordingly, the Court of Appeals correctly held DHHS responsible for ignoring Ms. Brown's obvious and known disabilities when creating and implementing its service plan.

<http://www.michigan.gov/emichigan/0,4575,7-112-63076-359554--,00.html> (accessed November 22, 2015).

CONCLUSION

For the foregoing reasons, Ms. Brown respectfully requests that this Court deny the L-GAL's Application for Leave to Appeal.

Respectfully submitted,
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